FILED
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No. (1)

IN THE

Supreme Court of the United States

MADELYN MILLER,

Petitioner,

—v.—

MARTIN H. BROWNSTEIN et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED

1. Was petitioner deprived of a property interest in her appeals before the Appellate Division Second Judicial Department of the Supreme Court of the State of New York in violation of Amendment Fourteen, Section One of the United States Constitution?

2. Was petitioner deprived of a property interest in her appeals before the Appellate Division Second Judicial Department of the Supreme Court of the State of New York in violation of Title 42, United States Code, Section 1983?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Madelyn Miller

Martin H. Brownstein

James E. Pelzer

The Office of the Clerk of the Court of the Appellate Division Second Judicial Department of the Supreme Court of the State of New York

Joseph Kelner and Robert Kelner,
individually and as partners in the
law firm of Kelner & Kelner,
a New York State Partnership

Kelner & Kelner

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at A1 to the petition and is reported at 290 AD2d 510.

The opinion of the Supreme Court of the State of New York, County of Kings appears at A4 to the petition and is unpublished.

The decision of the New York State Court Appeals appears at A14 to the petition and is reported at 98 NY2d 671.

The decision of the New York State Court of Appeals appears at A15 to the petition and is reported at 98 NY2d 613.

JURISDICTION

The date on which the highest state court decided this case was October 10, 2002. A copy of that decision appears at A15.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Fourteen of the United States Constitution, as well as Title 42, United States Code, Sections 1983, 1988 are involved in this case.

Petitioner contended in the New York State courts and contends here that due to misconduct on the part of the New York State Appellate Division Clerk, respondent Martin Brownstein, she sustained the dismissal and loss of her appeals when an appellant in that Court in 1994, without due process in contravention of Amendment Fourteen, Section 1 of the United States Constitution, and in violation of Title 42, United States Code, Section 1983. She further argues that respondent Brownstein's failure, as well as that of the successor clerk, respondent James Pelzer, to restore her appeals to their court's calendar, represented a continuing deprivation of petitioner's rights under the United States Constitution, Amendment Fourteen, Section 1, and a continuing violation of Title 42, United States Code, Section 1983. Additionally, she contends that she was entitled to legal fees pursuant to Title 42, United States Code, Section 1988.

The constitutional grounds were extensively raised by petitioner before New York State Supreme Court in the mandamus petition itself, as in her papers in opposition to respondents' dismissal motions, and again were raised in her brief and reply brief before the Appellate Division.

STATEMENT OF THE CASE

Petitioner commenced a mandamus proceeding in the Supreme Court of the State of New York, Kings county on July 3, 2000, pursuant to Article 78 of the CPLR against the former and successor Clerks of the Appellate Division, Second Department of the Supreme Court of the State of New York, Martin Brownstein and James Pelzer, to compel the restoration of her appeal to its calendar from two orders (Appellate Division case numbers 93-08289, 94-04268) in an action brought in New York State Supreme Court, County of Nassau, entitled Madelyn Miller, Plaintiff v. Joseph Kelner and Robert Kelner, individually and as partners in the law firm of Kelner & Kelner, a New York State Partnership, and Kelner & Kelner, Defendants, in which petitioner alleged legal malpractice.

Petitioner contended in the mandamus proceeding that due to misconduct on the part of the New York State Appellate Division Clerk, respondent Martin Brownstein, she sustained the dismissal and loss of her appeals in that Court without due process in contravention of Amendment Fourteen, Section 1 of the United States Constitution, and in violation of Title 42, United States Code, Section 1983. She further argued that his failure, as well as that of the successor clerk, respondent James Pelzer to restore her appeals to their court's calendar, represented a continuing deprivation of petitioner's rights under the United States Constitution, Amendment Fourteen, Section 1, and a continuing violation of Title 42, United States Code, Section 1983. Additionally, she contended that she was entitled to legal fees pursuant to Title 42, United States Code, Section 1988.

The mandamus proceeding underlying this case was commenced to compel the Appellate Division Clerk to restore petitioner's appeal to his court's calendar,

under the theory that despite the dismissal of the appeal, which she contended was caused by respondent Brownstein, there remained a continuing duty on his part, and then on the part of his successor, Mr. Pelzer, to file petitioner's appeal papers. The crux of the mandamus petition was that once respondent Brownstein accepted petitioner's appeal papers with the requisite filing fee, he could not reject the papers as allegedly late.

By order and judgment dated November 30, 2000 (A4), Justice Aaron Bernstein of the Kings County Supreme Court granted respondents' pre-answer motions to dismiss the petition.

Petitioner then appealed that order and judgment to the Appellate Division, Second Department, which unanimously affirmed Justice Bernstein's order and judgment in an order dated January 22, 2002 (A1).

By notice of appeal served and filed on March 29, 2002, petitioner appealed the order of affirmance of the Appellate Division, Second Department to the New York State Court of Appeals pursuant to CPLR 5601(b)(1). That appeal was dismissed by the Court of Appeals by order dated June 11, 2002 (A14).

By notice of motion dated July 22, 2002, petitioner requested permission to appeal the order of affirmance of the Appellate Division, Second Department to the New York State Court of Appeals. That motion was denied by the Court of Appeals by order dated October 10, 2002 (A15).

This petition for a Writ of Certiorari is timely brought.

REASONS FOR GRANTING THE PETITION

Petitioner raised valid federal issues in the mandamus proceeding underlying this request for certiorari. The crux of the proceeding was that petitioner had a perfected appeal before the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York in July of 1994. Respondent Brownstein had accepted petitioner's papers, along with the requisite filing fee for $250.00, which was cashed by the State of New York. Brownstein had no authority to then reject the papers as allegedly late. Petitioner had a perfected property interest in the disposition of her appeal protected by the constitution of the United States (as well as of the State of New York).

Petitioner maintained that Brownstein engaged in a series of acts that were in essence illegal, caused the dismissal of petitioner's appeal without due process and he discarded petitioner' s papers. A situation of a continuing duty/continuing wrong crystallized and froze into place. Respondent Pelzer, the successor clerk, also failed to restore the case to the Appellate Division's calendar.

Petitioner has valid claims against the New York State respondents, inclusive of declaratory, monetary, and injunctive relief for the continuing violation of her rights under the United States Constitution and under Title 42 United States Code Section 1983, that should have been addressed by the New York State courts.

The United States Supreme Court held in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), that state officials can be enjoined from inflicting unconstitutional deprivations on individuals. Injunctive relief, such as an order of reinstatement, was held to be available there and in more recent federal decisions such as *Sarteschi v.*

Burlein, 508 F2d 110 (3d Cir. 1975) and *Skehan v. Board of Trustees of Bloomsburg State College*, 590 Fed 470 (3d Cir. 1978), cert. denied, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 41 (1979).

In *Daisernia v. State of New York*, 582 F.Supp 792 (1984), the U.S. District Court, N.D. New York held that it was permissible to issue an order enjoining a state official to conform his conduct to the requirements of the Constitution.

In *Tango v. Tulevich*, 61 NY2d 34, 471 NYS2d 734, 59 NE2d 182 (1983), the New York State Court of Appeals held that a state official can be held liable under Title 42 United States Code, § 1983 in state court if that official, under color of state law, deprives the plaintiff of a federal right. That Court held that this applies if the act is ministerial in nature, (*Tango v. Tulevich*, supra), or if it is discretionary or quasi-judicial in nature and the official has stepped outside the scope of his authority, (*Pietra v. State*, 71 NY2d 792, 530 NYS2d 510, 526 NE2d 1 (1988), *Teddy's Drive In, Inc. v. Cohen*, 47 NY2d 79, 416 NYS2d 782, 390 NE2d 290 (1979)).

In *African American Legal Defense* v. *New York State*, 8 Fed Supp2d 330 (1998), U.S. District Court S.D. New York ruled that state officials who acted in violation of the United States Constitution or federal law, were not immune from lawsuits, and other federal courts have also held that state officials can be held personally liable for retrospective monetary relief if unconstitutional conduct by them is shown by a plaintiff (*Derechin v. State University of New York*, U.S. District Court, W.D. New York, 731 F.Supp. 1160 (1989), *Brook v. Thornburgh* , U.S. District Court, E.D. Pennsylvania, 497 F. Supp. 560 (1980)).

In *Sarteschi v. Burlein* and *Brook v. Thornburgh*, supra, the unconstitutional conduct by the defendant state officials were specifically held to be continuing

constitutional wrongs, requiring orders of reinstatement. Petitioner contends that she is likewise entitled to an order compelling the Appellate Division clerks to restore her appeal to their court's calendar, and/or for a monetary judgment against them in their individual capacities.

According to *Corpus Juris Secundum*, mandamus will lie to compel a clerk to file papers "on tender of fees" (55 *C.J.S.*, Section 76 at page 99), *Kozminsky v. Williams* (Supreme Court of California), 126 Cal 26, 58 P 310 (1899). Because petitioner paid the filing fee, her right to compel the performance of this duty has accrued from day to day, and did not abate with the dismissal of her appeal. Rather, the obligation and corresponding deprivation of petitioner's rights are of a continuing nature.

Additionally, this situation and the questions that it generates are certainly novel, as the very premise of the petition itself is that despite the dismissal of petitioner's appeal in 1994, there remained and continued to remain a duty on the part of the Appellate Division Clerk to place it on his court's calendar, along with a continuing deprivation of petitioner's rights under Amendment Fourteen Section One to the United States Constitution and under Title 42 United States Code § 1983. These issues have national implications, as they involve the duties and obligations of state officials vis-a-vis the federal rights of a litigant in New York State, which this Court ought to clarify, so that a similarly disturbing deprivation of an individual's rights does not occur elsewhere in this country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 13, 2003

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

8553B
K/jv

_AD2d_ Argued – November 19, 2001

FRED T. SANTUCCI, J.P.
SANDRA J. FEUERSTEIN
GABRIEL M. KRAUSMAN
DANIEL F. LUCIANO, JJ.

2001- 00706 DECISION & ORDER

In the Matter of Madelyn Miller, appellant,
v Martin H. Brownstein, et al., respondents.

Madelyn Miller, New York, N.Y., appellant *pro se*.

Eliot Spitzer, Attorney-General, New York, N.Y. (Michael S. Belohlavek and Charles F. Sanders of counsel), for State respondents.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City, N.Y. (Peter L Contini of counsel), for respondents Joseph Kelner and Robert Kelner.

In a proceeding pursuant to CPLR article 78, *inter alia*, to compel the Clerk of the Appellate Division, Second Judicial Department, to restore to the general calendar the petitioner appeals from two orders of the Supreme Court, Nassau County, in an action entitled *Miller v Kelner*, commenced under Index No. 32694/92, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Kings County (Bernstein, J.), dated November 30, 2000, which, upon granting the motion of the respondents

Joseph Kelner and Robert Kelner, individually and as partners in the law firm of Kelner & Kelner, a New York State Partnership, and Kelner & Kelner, and the separate motion of the respondents Martin H. Brownstein, James E. Pelzer, and the Office of the Clerk of the Court of the Appellate Division, Second Judicial Department, to dismiss the proceeding insofar as asserted against them, dismissed the proceeding.

ORDERED that the order and judgment is affirmed, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

Contrary to the petitioner's contention, the Supreme Court did not err in dismissing this proceeding as time-barred. CPLR 217 requires that a proceeding against a body or officer be commenced "within four months after the determination to be reviewed becomes final and binding upon the petitioner". A challenged determination is final and binding within the meaning of the statute when it has an impact upon the petitioner and when he or she knows that he or she is aggrieved (see, *Matter of Edmead v McGuire*, 67 NY2d 714; *Matter of James v Wing*, 281 AD2d 627, *lv denied* 96 NY2d 721). The petitioner challenges the refusal of the State respondents to calendar her two appeals which had been rejected for filing as untimely and which were ultimately dismissed on October 12, 1994. This determination became final and binding no later than October 15, 1996, when the Court of Appeals denied the petitioner's application for leave to appeal from the denial of her motion to vacate the dismissal of the appeals. Accordingly, the Supreme Court properly determined that this proceeding, commenced more than three years after the Court of Appeals denied the petitioner's leave application, is time-barred by the

applicable four-month Statute of Limitations (see, CPLR 217).

In light of our determination, we need not address the petitioner's remaining contentions.

SANTUCCI, J.P., FEUERSTEIN, KRAUSMAN and LUCIANO, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of November, 2000

PRESENT:

HON. AARON D. BERNSTEIN,
Justice.

Index No. 23018/00

MADELYN MILLER,

Petitioner(s),

-against-

MARTIN H. BROWNSTEIN and JAMES E. PELZER and THE OFFICE OF THE CLERK OF THE COURT of the APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT OF THE SUPREME COURT of the STATE OF NEW YORK, and JOSEPH KELNER and ROBERT KELNER, individually and as partners in the law firm of KELNER & KELNER, a New York State Partnership, and KELNER & KELNER,

Respondent(s).

The following papers number 1 to 8 read on this motion:

Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed
Papers Numbered 1-2 3-4 5-6
Opposing Affidavits (Affirmations) 7-8

Upon the foregoing papers in this proceeding brought by petitioner pursuant to CPLR article 78 and 3001, and 42 USC §§ 1983 and 1988, respondents Joseph Kelner and Robert Kelner, individually and as partners in the law firm of Kelner & Kelner, a New York State Partnership, and Kelner & Kelner ("the Kelner & Kelner respondents") move for an order dismissing the petition as against them, granting them sanctions against petitioner for the filing of frivolous and vexatious litigation, and permanently enjoining petitioner from initiating, serving, or filing any action, proceeding, litigation, motion, petition or claim with any court in any state against them based upon any of the events or circumstances involving or surrounding Kelner & Kelner's representation of petitioner with respect to her claims against the State of New York which arose out of an incident that occurred in 1976, or petitioner's legal malpractice lawsuit against Kelner & Kelner brought by her in connection with such claims, without first obtaining permission from a Justice of this court after disclosing this court's order on this motion.

Respondents Martin H. Brownstein, James E. Pelzer, and the Office of the Clerk of the Court of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York ("the State respondents") cross-move, pursuant to the CPLR 3211 (a)(2), (5), and (7), and 7804, for an order dismissing the petition as against them on the grounds that this court lacks subject matter jurisdiction over petitioner's claims, that such claims are barred by the applicable

Statute of Limitations, and that the petition fails to state a claim upon which relief may be granted.

In March 1976, petitioner, who at that time was a student at the State University of New York at Stony Brook, was attacked in her dormitory, where she resided. Thereafter, she retained the law firm of Kelner & Kelner to represent her in an action against the State of New York. On February 8, 1982, after a trial in the Court of Claims in which she was represented by Kelner & Kelner, petitioner was awarded damages for the injuries she sustained from the attack in the amount of $25,000. That award was appealed to the Appellate Division, Second Department, which dismissed the action on the ground that the State owed no duty to petitioner (Miller v State of New York, 96 AD2d 1031). Kelner & Kelner appealed this determination to the Court of Appeals, which reversed the Appellate Division, Second Department's decision and order, establishing new rules of law requiring the State to provide reasonable security for the safety of its dormitory students, and remitted the matter to the Appellate Division, Second Department (Miller v State of New York, 62 NY2d 506, 514). On remittitur, by decision and order dated June 21, 1985, the Appellate Division, Second Department, awarded damages in the amount of $400,000 to petitioner (Miller v State of New York, 110 AD2d 627, 627-628).

In March 1986, Kelner & Kelner applied to the Court of Claims for interest on the $400,000 award from February 8, 1982, the date of the original award of $25,000. By decision and order dated May 1, 1986, the Court of Claims denied the motion, holding that the amount of interest awarded to petitioner would be computed and allowed on the $25,000 portion of her award from February 8, 1982, the date of the initial Court of Claims decision, and on the remaining

$375,000 from June 21, 1985, the date of the $400,000 award.

In November 1992, petitioner brought a legal malpractice action against Kelner & Kelner, alleging that it committed malpractice by obtaining interest on the entire award only from June 21, 1985 instead of from the earlier date of February 8, 1982. By order dated September 8, 1993, the Supreme Court Nassau County, dismissed petitioner's complaint in that action. Petitioner appealed that order to the Appellate Division, Second Department, where she represented herself following the withdrawal of her counsel.

On May 20, 1994, petitioner moved to reargue the September 8, 1993 order dismissing the complaint. By order dated June 9, 1994, the Supreme Court, Nassau County, denied that motion. Petitioner sought to appeal the September 8, 1993 order and filed a motion to enlarge her time to perfect her appeal. That motion was granted by the Appellate Division, Second Department, on May 31, 1994, which enlarged her time to perfect the appeal until July 1, 1994.

By letter dated July 6, 1994, respondent Martin H. Brownstein, the Clerk of the Appellate Division, Second Department, advised petitioner that her appendix and brief were rejected on July 5, 1994 as being untimely, noting that petitioner first attempted to file her brief and appendix on July 1, 1994 between 5:45 and 6:00 p m. On August 25, 1994, petitioner's brief and appendix were sent back to petitioner following her failure to make arrangements with the Clerk's office to pick up such documents. After publication in the New York Law Journal's dismissal calendar for the Appellate Division, Second Department, and petitioner's failure to make an application within 10 days to cure her default, the Appellate Division, Second Department, by decision and order dated October 12, 1994, dismissed

petitioner's appeal pursuant to Appellate Division - Second Department Rules of Procedure in the Appellate Division (22 NYCRR) 670.8.

By letter dated March 30, 1995, petitioner advised Martin H. Brownstein that she never received his July 6, 1994 or August 25, 1994 mailings. Martin H. Brownstein, by letter dated April 4, 1995, advised petitioner that she could move to vacate the dismissal of her appeal. By letter dated May 9, 1995, petitioner contended that copies of her brief and appendix should have been accepted for filing because her representative arrived at the Appellate Division, Second Department, to file the documents on July 1 1995 at approximately 5:00 p m, but that no court clerks were present to receive the filing. She stated that a court officer wrote a note acknowledging her representative's presence, time-stamped the note 5:21 p m, and advised her representative to return on July 5, 1995 to file copies of the brief and appendix. Petitioner's representative left the documents on the counter in the Clerk's Office on the same day.

Based upon the foregoing claims, petitioner made a motion to vacate the dismissal of her appeal. By decision and order dated September 19, 1995, the Appellate Division, Second Department, denied her motion. By decision and order dated January 8, 1996, the Appellate Division, Second Department, also denied a motion by petitioner to reargue the denial of said motion to vacate.

Petitioner appealed to the Court of Appeals from the Appellate Division orders dated October 12, 1994 and September 19, 1995. By decision and order dated June 13, 1996, the Court of Appeals dismissed the appeal upon the grounds that the October 12, 1994 order did not directly involve a substantial constitutional question and that both orders did not finally determine the action within the meaning of the

New York State Constitution (Miller v Kelner, 88 NY2d 916, 916-917). On July 30, 1996, petitioner again moved for leave to appeal from the October 12, 1994 Appellate Division order dismissing her appeal, and by decision and order dated October 15, 1996, the Court of Appeals denied that motion.

Petitioner has now brought the instant proceeding against respondents to compel the Appellate Division, Second Department, and the Clerk of that Court to restore her appeal to the general calendar. She alleges that Martin H. Brownstein was required by the New York State Constitution and the laws of this State to place her appeal on the calendar upon her payment of the $250 filing fee to the Appellate Division, Second Department, that his refusal to do so was illegal, malicious, and in excess of his authority, and a deprivation of her rights under the Fourteenth Amendment to the U.S. Constitution, the New York State Constitution, the laws of the State of New York, 42 USC § 1983, and her rights to equal protection and due process. She claims that the continued failure by respondent James E. Pelzer, who, in November 1999, replaced Martin H. Brownstein as the Clerk of the Appellate Division, Second Department, to restore her appeal to the calendar represents a continuing failure to perform a duty enjoined upon him by law, a continuing deprivation of her rights, and a continuing violation of 42 USC § 1983. She seeks relief, under CPLR article 78, directing James E. Pelzer to restore her appeal to the general calendar of the Appellate Division, Second Department, a declaration that she was deprived other rights, and an award of $5 million in damages.

In opposition to the motion and cross motion to dismiss the petition, petitioner argues that Martin H. Brownstein lacked the discretion to reject her papers as late because he accepted her papers and the filing

fee of $250 on July 5, 1994 and that this perfected her appeal. Such argument is unavailing. Pursuant to Appellate Division-Second Department Rules of Procedure in the Appellate Division (22 NYCRR) 670.8(a), "[a]n appeal may be placed on the general calendar by filing with the clerk the record on appeal pursuant to one of the methods set forth in section 670.9 of th[at] Part and by filing nine copies of a brief, with proof of service of two copies upon each of the other parties" (emphasis supplied). This rule does not mandate that the Clerk must put the appeal on the calendar without exercising his discretion in determining whether the requirements of this rule have been met. Indeed, Appellate Division-Second Department Rules of Procedure in the Appellate Division (22 NYCRR) 670.8 (h) requires that where the appellant fails "to make an application to enlarge [the] time to perfect within 10 days following the last day of publication [of the clerk's calendar in the New York Law Journal], an order shall be entered dismissing [a civil] cause" which has not been timely perfected (emphasis supplied).

"The extraordinary remedy of mandamus will lie only to compel the performance of a [purely] ministerial act, and only when there exists a clear legal right to the relief sought" (Matter of Mullins v O'Dwyer, __AD2d __, NYLJ, Oct. 30, 2000, at 28, col 6; see also, Matter of Legal Aid Socy. v Scheinman, 53 NY2d 12, 16). A proceeding in the nature of mandamus is unavailable where a petitioner seeks a court order compelling a body or officer to perform a statutory duty which is entirely discretionary (see, Matter of County of Fulton v State of New York, 76 NY2d 675, 678; Klostermann v Cuomo, 61 NY2d 525, 539; Matter of Hamptons Hosp. & Med. Center v Moore, 52 NY2d 88, 96-97). Thus, inasmuch as the act sought to be compelled by petitioner is discretionary and not

ministerial and petitioner has failed to demonstrate a clear legal right to the relief sought, a writ of mandamus will not lie to compel the Appellate Division, Second Department, and its Clerk to restore petitioner's appeal (see, Matter of Crain Communications v Hughes, 74 NY2d 626, 628; Matter of Morgenthau v Gold, 69 NY2d 735, 737; Matter of Legal Aid Socy. v Scheinman, supra, 53 NY2d, at 16) and petitioner has failed to state a viable cause of action in this proceeding (see, CPLR 3211 [a][7], 7804 [f]).

Moreover, the Appellate Division, Second Department, has already issued binding rulings on the very same issues raised by the petition herein in its order of October 12, 1994, which determined that petitioner failed to perfect her appeal in accordance with the rules of that court, and in its order of September 19, 1995, which denied petitioner's motion to vacate the dismissal of her appeal. Petitioner's contention that her petition raises different issues than those addressed and determined by the Appellate Division, Second Department, because she did not previously argue that Martin H. Brownstein acted illegally and deprived her of her property interest in her appeal without due process, thereby violating her rights under the New York State Constitution, the U.S. Constitution, and 42 USC § 1983, or that Martin H. Brownstein had a duty enjoined on him by law to file her appeal papers, is devoid of merit. Although petitioner now attempts to frame her claims in the form of a CPLR article 78 proceeding with constitutional arguments, the subject of these claims, the issues raised, and the ultimate relief sought by her (i.e., restoration of her appeal to the calendar) are, in essence, identical to those already raised, addressed, and finally decided and rejected by the orders of the Appellate Division, Second Department. The petition's

allegations, however couched, seek for this court to modify, overturn, or vacate the order of the Appellate Division, Second Department, which denied petitioner leave to appeal. Such determination may not be collaterally attacked by way of mandamus (see, Matter of Branciforte v Spanish Naturopath Socy., 217 AD2d 619).

Petitioner's only proper remedy was to seek to appeal the orders of the Appellate Division, Second Department, to the Court of Appeals, which she has already done, albeit unsuccessfully (see, id., at 619-620). This court may not disregard these earlier orders by these higher appellate courts and is plainly without the authority to modify, overturn, or vacate such orders (see, id., at 620; Fleet Credit Corp. v. Cabin Serv. Co., 210 AD2d 57; Brown v Brown, 169 AD2d 487; Maracina v Schirrmeister, 152 AD2d 502, 502-503). Thus, the petition must be dismissed as this court lacks subject matter jurisdiction to grant the relief which petitioner seeks herein (see, CPLR 3211 [a][2], 7804 9[f]). Petitioner's claims are also barred by the doctrine of res judicata (see, CPLR 3211 [a] [5], 7804 [f]).

Dismissal of the petition is further required on the additional ground that it is time-barred (see, CPLR 3211 [a][5], 7804 [f]). Petitioner's argument that her petition is not time-barred because she alleges therein that the Clerk of the Appellate Division, Second Department, failed to comply with a continuing constitutional or statutory duty, is rejected. Under CPLR 217(1), a proceeding against a body or officer must be commenced within four months after the determination sought to be reviewed becomes final and binding upon the petitioner or after the respondent's refusal to perform the duty believed to be mandated took place (see, Matter of Village of Westbury v Department of Transp. of State of N.Y., 75

NY2d 62, 72; Washington v Alissa Kampner Rudin - Victims Servs., 256 AD2d 178, 179). Here, the latest possible date that petitioner's rights were determined was when the Court of Appeals denied petitioner's motion for leave to appeal on October 15, 1996. Consequently, her petition, sworn to on July 3, 2000, was untimely.

The court has considered all of petitioner's remaining contentions in opposition to the motion and cross motion and finds them to be without merit.

Accordingly, the Kelner & Kelner respondents' motion to the extent that it seeks dismissal of the petition is granted. The Kelner & Kelner respondents' motion insofar as it seeks the imposition of sanctions against petitioner is denied as the court finds that the pro se petitioner's conduct does not rise to the level of frivolous conduct, as defined in Rules of the Chief Administrator (22 NYCRR) 130-1.1(c), to warrant such sanctions (see, Rules of the Chief Administrator [22 NYCRR] 130-1.1[a],[c]). Additionally, the court declines to grant the Kelner & Kelner respondents the injunction requested by them in their motion as this court will not deprive petitioner of her lawful right to appeal this order (see, CPLR 5501, 5511). The State respondents' cross motion to dismiss the petition as against them is granted.

This constitutes the decision, order, and judgment of the court.

ENTER
"s/Aaron D. Bernstein"
J.S.C.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh day of June 2002

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 587 SSD 22

In the Matter of Madelyn Miller,
Appellant,
v.
Martin H. Brownstein et al.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

"s/Stuart M. Cohen"
Clerk of the Court

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of October 2002

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

2-10 Mo. No. 876

In the Matter of Madelyn Miller,
Appellant,
v.
Martin H. Brownstein et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

"s/Stuart M. Cohen"
Clerk of the Court

Index No. 23018-00

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MADELYN MILLER,

NOTICE OF PETITION TO COMPEL RESTORATION OF APPEAL TO CALENDAR

Petitioner,

-against-

MARTIN H. BROWNSTEIN and
JAMES E. PELZER and
THE OFFICE OF THE CLERK OF THE COURT
of the Appellate Division Second Judicial
Department of the Supreme Court
of the State of New York and
JOSEPH KELNER and ROBERT KELNER,
individually and as partners in the
law firm of KELNER & KELNER,
a New York State Partnership,
and KELNER & KELNER,

Respondents.

PLEASE TAKE NOTICE, that upon the annexed verified petition, an application will be made at a Special Term of the Supreme Court, Kings County, to be held at the Kings County Courthouse in the City of New York, on the 25 day of August, 2000 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for relief as fully set forth in the petition, including as part of that relief, an order directing James E. Pelzer, Clerk of the Court of the Appellate Division, Second Judicial Department to perform his duty, enjoined upon him by the constitution and the laws of the state of New York to

restore petitioner's appeal to the general calendar of the Appellate Division, Second Judicial Department, together with any other and further relief as justice requires.

Dated: New York, New York
July 3, 2000

MADELYN MILLER
Petitioner Pro Se
201 Varick Street
Box 436
New York, N.Y.
10014
212-506-6442

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PETITION TO COMPEL
RESTORATION OF
APPEAL TO CALENDAR

MADELYN MILLER,

Petitioner,

-against-

MARTIN H. BROWNSTEIN and
JAMES E. PELZER and
THE OFFICE OF THE CLERK OF THE COURT
of the Appellate Division Second Judicial
Department of the Supreme Court
of the State of New York and
JOSEPH KELNER and ROBERT KELNER,
individually and as partners in the
law firm of KELNER & KELNER,
a New York State Partnership,
and KELNER & KELNER,

Respondents.

Petitioner, Madelyn Miller, for her Petition against the respondents alleges as follows:

1. That at all times hereinafter mentioned petitioner was and now is a resident of the city of New York, county of New York, state of New York.

2. That at all times herein mentioned respondent Martin H. Brownstein was the Clerk of the Court of the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York until on or about November, 1999.

3. That on or about November, 1999 respondent James E. Pelzer became and now is the Clerk of the Court of the Appellate Division, Second Judicial

Department of the Supreme Court of the State of New York.

4. Upon information and belief, at all times hereinafter mentioned, respondent Joseph Kelner was and now is a resident of Nassau County, New York.

5. Upon information and belief, at all times hereinafter mentioned, respondent Robert Kelner was and now is a resident of Nassau County, New York.

6. Upon information and belief, respondent, Kelner & Kelner, is a New York State partnership engaged in the practice of law with offices in New York County and Nassau County, New York, whose partners are respondents, Joseph Kelner and Robert Kelner.

7. This petition is brought pursuant to CPLR 3001, Article 78, Title 42, United States Code, Sections 1983 and 1988, and under the equitable powers of this honorable Court.

8. That on or about October, 1993 petitioner filed a notice of appeal to the Appellate Division, Second Judicial Department from two orders of the Supreme Court, Nassau County, dated May 5, 1993 and September 8, 1993 respectively in an action entitled Madelyn Miller, Plaintiff v. Joseph Kelner and Robert Kelner, individually and as partners in the law firm of Kelner & Kelner, a New York State Partnership, and Kelner & Kelner, Defendants, which had the index number of 32694/92.

9. That petitioner's appeals were assigned the case numbers of 93-08289 and 94-04268 in the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York.

10. That on or about June 30, 1994 the petitioner subpoenaed all the papers constituting the record on appeal from the clerk of the Supreme Court of the State of New York, Nassau County.

11. That upon information and belief, on or about July 5, 1994, petitioner filed nine sets of briefs with

appendices with respondent Martin H. Brownstein, acting as Clerk of the Court of the Appellate Division, Second Judicial Department.

12. That on or about July 5, 1994 upon filing the above-referenced nine sets of briefs with appendices, petitioner paid a filing fee of $250.00 by check made out to the Appellate Division, Second Judicial Department.

13. That upon information and belief, on or about July 5, 1994, said filing fee was tendered to respondent Martin H. Brownstein on behalf of the state of New York, acting as Clerk of the Court of the Appellate Division, Second Judicial Department.

14. That on or about July 5, 1994, petitioner's appeal to the Appellate Division, Second Judicial Department was perfected.

15. That upon information and belief, on or about July 5, 1994, the above-referenced check for $250.00 was deposited by the Appellate Division, Second Judicial Department.

16. That on or about July 6, 1994 respondent Martin H. Brownstein rejected petitioner's nine sets of briefs with appendices.

17. That on or about July 6, 1994 respondent Martin H. Brownstein refused to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department and/or removed it from same.

18. That on or about August 31, 1994 respondent Martin H. Brownstein discarded petitioner's nine sets of briefs with appendices.

19. That on or about September, 1994 respondent Martin H. Brownstein placed the petitioner's appeals on the dismissal calendar of the Appellate Division, Second Judicial Department.

20. That on or about October 12, 1994 the Appellate Division, Second Judicial Department issued an order dismissing petitioner's appeals.

21. That on or about May 30, 1995, petitioner motioned the Appellate Division, Second Judicial Department to vacate its order dismissing the appeals.

22. Than on or abut September 19, 1995, the Appellate Division, Second judicial Department issued an order denying petitioner's motion to vacate its order dismissing the appeals.

23. Annexed to the instant petition is a copy of the above-referenced check written for the filing fee in the amount of $250.00 paid to the Appellate Division, Second Judicial Department, a copy of a letter dated July 6, 1994 signed by respondent Martin H. Brownstein, a copy of an order of-the Appellate Division, Second Judicial Department dated October 12, 1994 dismissing petitioner's appeals, and a copy of an order of the Appellate Division, Second Judicial Department dated September 19, 1995 denying petitioner's motion to vacate its order dismissing petitioner's appeals (with other and further documentation available upon request).

FIRST CAUSE OF ACTION

24. Paragraphs 1 through 23 are repeated and realleged as if fully set forth.

25. In refusing to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or in removing it from same, in placing petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial, Department and in discarding petitioner's nine sets of briefs with appendices, respondent Martin H. Brownstein acted illegally, maliciously and in excess of his authority,

and deprived petitioner of rights secured by the constitution and the laws of the state of New York.

26. The refusal to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or its removal from same, the placing of petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial Department and the discarding of petitioner's nine sets of briefs with appendices by respondent Martin H. Brownstein were done with the intent and purpose of depriving petitioner of valuable property—her appeal before the Appellate Division, Second Judicial Department—without due process of law, in violation of the constitution and the laws of the state of New York.

27. Based on the foregoing, petitioner demands judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

28. Paragraphs 1 through 27 are repeated and realleged as if fully set forth.

29. Respondent Martin H. Brownstein was enjoined by the New York state constitution and the laws of the state of New York to perform all of his duties as Clerk of the Court of the Appellate Division, Second Judicial Department.

30. Respondent Martin H. Brownstein was enjoined by the New York state constitution and the laws of the state of New York to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department upon the payment of the $250.00 filing fee to the Appellate Division, Second Judicial Department.

31. As heretofore set forth respondent Martin H. Brownstein failed to follow said duty enjoined upon him by the constitution and the laws of the state of New York.

32. Based on the foregoing, petitioner demands judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

33. Paragraphs 1 through 32 are repeated and realleged as if fully set forth.

34. In refusing to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or in removing it from same, in placing petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial Department and in discarding petitioner's nine sets of briefs with appendices, respondent Martin H. Brownstein acted illegally, maliciously and in excess of his authority, and deprived the petitioner of, rights under the United States Constitution, Amendment Fourteen and of the equal protection of the laws and due process of the laws.

35. The refusal to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or its removal from same, the placing of petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial Department and the discarding of petitioner's nine sets of briefs with appendices by respondent Martin H. Brownstein were done with the intent and purpose of depriving petitioner of valuable property—her appeal before the Appellate Division, Second Judicial Department without due process of law, in violation of the United States Constitution, Amendment Fourteen.

36. Based on the foregoing, the petitioner demands judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION

37. Paragraphs 1 through 36 are repeated and realleged as if fully set forth.

38. In refusing to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or in removing it from same, in placing petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial Department and in discarding petitioner's nine sets of briefs with appendices, respondent Martin H. Brownstein acted illegally, maliciously and in excess of his authority, and deprived petitioner of rights, privileges and immunities secured by the Constitution of the United States and the laws of the state of New York in violation of Title 42, United States Code, Section 1983, entitling Petitioner to relief thereunder.

39. Based on the foregoing, the petitioner demands judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

40. Paragraphs 1 through 39 are repeated and realleged as if fully set forth.

41. The failure of respondent Martin H. Brownstein to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represented a continuing failure to perform a duty enjoined upon him by the constitution and the laws of the state of New York.

42. Based on the foregoing, petitioner demands judgment as hereinafter set forth.

SIXTH CAUSE OF ACTION

43. Paragraphs 1 through 42 are repeated and realleged as if fully set forth.

44. The failure of respondent Martin H. Brownstein to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represented a continuing deprivation of petitioner's rights under the United States Constitution,

Amendment Fourteen, the Constitution and laws of the state of New York, and of the equal protection and due process of the laws and represented a continuing violation of Title 42, United States Code, Section 1983.

45. Based on the foregoing, petitioner demands judgment as hereinafter set forth.

SEVENTH CAUSE OF ACTION

46. Paragraphs 1 through 45 are repeated and realleged as if fully set forth.

47. The failure of respondent James E. Pelzer to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represents a continuing failure to perform a duty enjoined upon him by the constitution and the laws of the state of New York.

48. Based on the foregoing, petitioner demands judgment as hereinafter set forth.

EIGHTH CAUSE OF ACTION

49. Paragraphs 1 through 48 are repeated and realleged as if fully set forth.

50. The failure of respondent James E. Pelzer to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represents a continuing deprivation of petitioner's rights under the United States Constitution, Amendment Fourteen, the Constitution and laws of the state of New York, and of the equal protection and due process of the laws and represents a continuing violation of Title 42, United States Code, Section 1983.

51. Based on the foregoing, petitioner demands judgment as hereinafter set forth.

NINTH CAUSE OF ACTION

52. Paragraphs 1 through 51 are repeated and realleged as if fully set forth.

53. Petitioner will be wrongfully deprived of her appeal unless this Court compels James E. Pelzer, as Clerk of the Appellate Division, Second Judicial Department to perform the duties enjoined by law upon him.

54. This is an action brought in part, pursuant to Title 42, United States Code, Section 1983, thereby entitling petitioner to attorneys' fees, costs and expenses pursuant to Title 42, United States Code Section 1988.

WHEREFORE, the petitioner demands judgment as follows:

1. Declaring that respondent Martin H. Brownstein was enjoined by the New York state constitution and the laws of the state of New York to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department upon the payment of the $250.00 filing fee to the Appellate Division, Second Judicial Department.

2. Declaring the refusal to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or its removal from same, the placing of petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial Department and the discarding of petitioner's nine sets of briefs with appendices by respondent Martin H. Brownstein to have been illegal, malicious and in excess of his authority, and a deprivation of petitioner's rights under the United States Constitution, Amendment Fourteen, the Constitution and the laws of the state of New York and to the equal protection of the laws and due process of the laws.

3. Declaring the refusal to place petitioner's appeal on the general calendar of the Appellate Division, Second Judicial Department or its removal from same, the placing of petitioner's appeal on the dismissal calendar of the Appellate Division, Second Judicial Department and the discarding of petitioner's nine sets of briefs with appendices by respondent Martin H. Brownstein to have been a deprivation of petitioner's rights, privileges and immunities secured by the Constitution of the United States, Amendment Fourteen and the laws of the state of New York in violation of Title 42, United States Code, Section 1983, entitling petitioner to relief thereunder.

4. Declaring that the failure of respondent Martin H. Brownstein to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represented a continuing failure to perform a duty enjoined upon him by the constitution and the laws of the state of New York.

5. Declaring that the failure of respondent Martin H. Brownstein to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represented a continuing deprivation of petitioner's rights under the United States Constitution, Amendment Fourteen, the Constitution and laws of the state of New York and of equal protection of and due process of the laws.

6. Declaring that the failure of respondent Martin H. Brownstein to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represented a continuing violation of Title 42, United States Code, Section 1983.

7. Declaring that the failure of respondent James E. Pelzer to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represents a continuing failure to perform a duty

enjoined upon him by the constitution and the laws of the state of New York

8. Declaring that the failure of respondent James E. Pelzer to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represents a continuing deprivation of petitioner's rights under the United States Constitution Amendment Fourteen, the New York state Constitution and the laws of the state of New York and to the equal protection of the laws and due process of the laws.

9. Declaring that the failure of respondent James E. Pelzer to restore petitioner's appeal to the calendar of the Appellate Division, Second Judicial Department represents a continuing violation of Title 42, United States Code, Section 1983.

10. Issuing an order, pursuant to CPLR Article 78, directing James E. Pelzer to perform his duty, enjoined upon him by the constitution and the laws of the state of New York to restore petitioner's appeal to the general calendar of the Appellate Division, Second Judicial Department.

11. Awarding petitioner $5 million in damages for the violations set forth.

12. Awarding petitioner reasonable attorneys' fees for the prosecution of this action including costs and expenses.

13. Awarding any other and further relief as justice requires.

Dated: New York, New York
July 3, 2002

Yours, etc.,
MADELYN MILLER,
Petitioner pro se

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MADELYN MILLER,
Petitioner,
-against-

INDIVIDUAL VERIFICATION

MARTIN H. BROWNSTEIN and
JAMES E. PELZER and
THE OFFICE OF THE CLERK OF THE COURT
of the Appellate Division Second Judicial
Department of the Supreme Court
of the State of New York and
JOSEPH KELNER and ROBERT KELNER.
individually and as partners in the
law firm of KELNER & KELNER,
a New York State Partnership,
and KELNER & KELNER,
Respondents.

State of New York }
} SS:
County of New York)

MADELYN MILLER, being duly sworn, deposes and says: I am one the Petitioner herein. I have read the foregoing and know the contents thereof. The same is true to my own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

"s/Madelyn Miller"

Sworn to before me this 3 day of July, 2000
"s/Edward A. Cuchel"
Notary Public, State of New York

No. 01CU4607125
Qualified in Richmond County
Commission Expires October 31, 2001